

# MANDATE

21-1702-cv

Moore v. Baron Cohen

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,  
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the  
3 City of New York, on the 7<sup>th</sup> day of July, two thousand twenty-two.

4  
5 PRESENT: ROSEMARY S. POOLER,  
6 GERARD E. LYNCH,  
7 RAYMOND J. LOHIER, JR.,  
8 *Circuit Judges.*

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10 ROY STEWART MOORE, AN  
11 INDIVIDUAL, KAYLA MOORE, AN  
12 INDIVIDUAL,

13  
14 *Plaintiffs-Appellants,*

15  
16 v. No. 21-1702-cv

17  
18 SACHA NOAM BARON COHEN, AN  
19 INDIVIDUAL, SHOWTIME, INC., CBS

1 CORPORATION,  
2

3 *Defendants-Appellees.*  
4

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5 FOR PLAINTIFFS-APPELLANTS:

LARRY KLAYMAN, Klayman  
6 Law Group P.A., Boca Raton,  
7 FL (Melissa Isaak, Isaak Law  
8 Firm, Montgomery, AL, *on the*  
9 *brief*)  
10

11 FOR DEFENDANTS-APPELLEES:

ELIZABETH A. McNAMARA  
12 (Rachel F. Strom, Eric J. Feder,  
13 Carl Mazurek, *on the brief*),  
14 Davis Wright Tremaine LLP,  
15 New York, NY  
16

Appeal from an order of the United States District Court for the Southern  
17 District of New York (John P. Cronan, *Judge*).  
18

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,

19 AND DECREED that the July 13, 2021 order of the District Court is AFFIRMED.  
20

Judge Roy Moore and Kayla Moore appeal from a July 13, 2021 order of  
21 the United States District Court for the Southern District of New York (Cronan,  
22 L.) granting Sacha Noam Baron Cohen, Showtime, Inc., and CBS Corporation's

1 motion for summary judgment.<sup>1</sup> Baron Cohen created, co-produced, and co-  
2 wrote Who Is America?, a television program that aired on Showtime. As part of  
3 the show, Baron Cohen and his team convinced Roy Moore (“Judge Moore”), a  
4 former Chief Justice of the Supreme Court of Alabama and a former Senate  
5 candidate from Alabama, to fly to Washington, D.C. to receive a prize in honor of  
6 his support for the state of Israel and to be interviewed by an Israeli television  
7 program. It was a ruse: He was instead interviewed by Baron Cohen, who  
8 presented himself as an Israeli anti-terrorism expert and former intelligence  
9 agent. The episode of the program in which the interview aired led into the  
10 interview with news clips reporting allegations from the time of Judge Moore’s

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<sup>1</sup> We note that the District Court did not enter a separate judgment dismissing the action as required by Fed. R. Civ. P. 58(a). When a judgment is required to be set out in a separate document but is not, judgment is deemed entered 150 days after the entry of the dispositive order. Fed. R. Civ. P. 58(c)(2)(B). Despite the lack of a separate judgment, we have jurisdiction to hear the appeal because the July 13, 2021 opinion and order “end[ed] the litigation on the merits and [left] nothing for the court to do but execute the judgment.” Hall v. Hall, 138 S. Ct. 1118, 1123–24 (2018) (quotation marks omitted); see 28 U.S.C. § 1291 (providing appellate jurisdiction over “appeals from all final decisions of the district courts”). “[W]here the District Court makes a decision intended to be ‘final,’ the better procedure is to set forth the decision in a separate document called a judgment.” Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 449 (2d Cir. 1978) (citations omitted), abrogated on other grounds by Espinoza ex rel. JPMorgan Chase & Co. v. Dimon, 797 F.3d 229 (2d Cir. 2015).

1 Senate campaign that he had engaged in sexual misconduct as an adult,  
2 including with one woman who was fourteen at the time. During the interview  
3 itself, Baron Cohen, in character, described a fictional device that the Israeli  
4 military had purportedly developed to detect underground tunnels, which  
5 would also “identify other abnormalities,” including “sex offenders and  
6 particularly pedophiles,” by picking up on a certain “enzyme” that they secrete  
7 at “three times the level of non-perverts.” App’x 97–98. Baron Cohen then  
8 produced a wand-like object that was supposed to be that device and waved it  
9 over Judge Moore, at which point it beeped. After a tense exchange between the  
10 two, Judge Moore exited the set, amid protestations by Baron Cohen that he was  
11 not saying that Judge Moore was a pedophile.

12 Judge Moore and his wife Kayla Moore then sued Baron Cohen,  
13 Showtime, and CBS, Showtime’s parent corporation. Both Plaintiffs asserted  
14 claims of intentional infliction of emotional distress and fraud, and Judge Moore  
15 also raised a defamation claim. We assume the parties’ familiarity with the  
16 underlying facts and prior record of proceedings, to which we refer only as  
17 necessary to explain our decision to affirm.

1           **I.       Judge Moore**

2           Although Judge Moore did not know the true purpose of the interview, he  
3           knew that the interview would be televised. He signed a Standard Consent  
4           Agreement (“SCA”) with Yerushalayim TV, a company created by and  
5           associated with Baron Cohen, and various related companies and individuals,  
6           including the Defendants. Under the SCA, Judge Moore agreed to release certain  
7           potential claims against the producer or “anyone associated with the Program”—  
8           including the Defendants.<sup>2</sup> The release waiver of the SCA states:

9           [Judge Moore] waives, and agrees not to bring at any time in the  
10          future, any claims against the Producer, or against any of its  
11          assignees or licensees or anyone associated with the Program, which  
12          are related to the Program or its production, or this agreement,  
13          including, but not limited to, claims involving assertions of . . . (h)  
14          infliction of emotional distress (whether allegedly intentional or  
15          negligent), . . . (m) defamation (such as any allegedly false  
16          statements made in the Program), . . . [or] (p) fraud (such as any  
17          alleged deception about the Program or this consent agreement).  
18

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<sup>2</sup> The parties disputed in the District Court whether all of the Defendants were covered by the SCA, but after discovery was taken with respect to the ownership structure and corporate identity of the various production companies involved, the District Court held that they were. Judge Moore does not challenge that holding on appeal.

1 App'x 117. As originally printed, the release also waived claims of "intrusion or  
2 invasion of privacy (such as any allegedly sexual oriented or offensive behavior  
3 or questioning)," but Judge Moore crossed out the parenthetical by hand. Id.  
4 Another clause states that, "in entering into the [SCA], the Participant is not  
5 relying upon any promises or statements made by anyone about the nature of the  
6 Program or the identity, behavior, or qualifications of any other participants, cast  
7 members, or other persons involved in the program," and that Judge Moore "is  
8 signing this agreement with no expectations or understanding concerning the  
9 conduct, offensive or otherwise, of anyone involved in this Program." Id.

10 The plain text of the SCA bars Judge Moore's claims for defamation,  
11 intentional infliction of emotional distress, and fraud. Nevertheless, he argues  
12 that (1) the waiver provision is unenforceable because his consent was procured  
13 fraudulently, (2) the release waiver does not apply to his claims because of the  
14 handwritten modification, and (3) the SCA is an unenforceable general release.  
15 We are not persuaded.

16 First, under New York law, which the parties agree governs the claims at  
17 issue, when a provision of a contract, such as paragraph 5 of the SCA, "states that

1 a contracting party disclaims the existence of or reliance upon specified  
2 representations, that party will not be allowed to claim that he was defrauded  
3 into entering the contract in reliance on those representations.” Mfrs. Hanover  
4 Tr. Co. v. Yanakas, 7 F.3d 310, 315 (2d Cir. 1993); see Citibank, N.A. v. Plapinger  
5 66 N.Y.2d 90, 94–95 (1985); Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 320–21  
6 (1959). Judge Moore’s stipulation that he did not rely on any representations  
7 made to him about the program “destroys the allegations in [his] complaint that  
8 the agreement was executed in reliance upon these contrary oral  
9 representations.” Danann, 5 N.Y.2d at 320–21.

10 Second, Judge Moore’s proposed interpretation of the release conflicts  
11 with the plain language of the contract. “Under New York law, a court must  
12 give full effect to unambiguous contract terms,” and “a party’s subjective intent  
13 and understanding of the terms is irrelevant.” HOP Energy, L.L.C. v. Local 553  
14 Pension Fund, 678 F.3d 158, 162 (2d Cir. 2012); see also Greenfield v. Philles  
15 Records, Inc., 98 N.Y.2d 562, 569 (2002). Judge Moore argues that because he  
16 modified a different provision of the waiver agreement, concerning a different  
17 potential cause of action, the plain language of the contract does not mean what

1 it says. We disagree, and like the District Court we see no ambiguity in Moore's  
2 release of all claims asserting infliction of emotional distress, defamation, and  
3 fraud—the only causes of action asserted here.

4 Third, we address Judge Moore's argument that the SCA is an  
5 "unenforceable general release." Appellants' Br. 30. In the context of general  
6 releases, "an unreformed general release will be given its full literal effect where  
7 it is directly or circumstantially evident that the purpose is to achieve a truly  
8 general settlement," but a release may be avoided "with respect to  
9 uncontemplated transactions despite the generality of the language in the release  
10 form." Mangini v. McClurg, 24 N.Y.2d 556, 562 (1969). We need not decide  
11 whether the SCA contained a general release, however, because, as discussed  
12 above, Judge Moore's claims are specifically precluded by the SCA. Under New  
13 York law, we give effect to the intention of the parties as reflected in the  
14 language of the contract. See Metro. Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d  
15 884, 889 (2d Cir. 1990). Even if Judge Moore intended not to waive any claims  
16 arising from accusations of pedophilia or sexual misconduct, "a party's

1 subjective intent and understanding of the terms is irrelevant.” HOP Energy, 678  
2 F.3d at 162.

3           **II.     Kayla Moore**

4           We next address Kayla Moore’s claims of intentional infliction of  
5 emotional distress and fraud. Like the District Court, we conclude that the First  
6 Amendment bars her claims. “[H]eightened First Amendment protections apply  
7 to any tort alleging reputational harm as long as the underlying speech relates to  
8 a matter of public concern.” Dongguk Univ. v. Yale Univ., 734 F.3d 113, 129 (2d  
9 Cir. 2013). “Speech deals with matters of public concern when it can be fairly  
10 considered as relating to any matter of political, social, or other concern to the  
11 community, or when it is a subject of legitimate news interest; that is, a subject of  
12 general interest and of value and concern to the public.” Snyder v. Phelps, 562  
13 U.S. 443, 453 (2011) (citation and quotation marks omitted). We agree with the  
14 District Court that the allegations against Judge Moore were a matter of public  
15 concern. Judge Moore has been a frequent candidate for political office and had  
16 just recently run for Senate at the time that the segment aired; allegations of  
17 wrongdoing clearly bore on his fitness for office. The determinative issue is thus

1 whether the segment could “reasonably have been interpreted as stating actual  
2 facts about” Judge Moore. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988);  
3 see also Milkovich v. Lorain J. Co., 497 U.S. 1, 17 (1990). We agree with the  
4 District Court that the segment at issue was clearly comedy and that no  
5 reasonable viewer would conclude otherwise. See Moore v. Baron Cohen, 548 F.  
6 Supp. 3d 330, 348 (S.D.N.Y. 2021). The segment opened by referencing news  
7 clips of the allegations that Judge Moore had engaged in sexual misconduct,  
8 including with minors, and what followed was an attempt to comment on those  
9 allegations through humor. Baron Cohen may have implied (despite his in-  
10 character disclaimers of any belief that Judge Moore was a pedophile) that he  
11 believed Judge Moore’s accusers, but he did not imply the existence of any  
12 independent factual basis for that belief besides the obviously farcical pedophile-  
13 detecting “device,” which no reasonable person could believe to be an actual,  
14 functioning piece of technology. “Humor is an important medium of legitimate  
15 expression and central to the well-being of individuals, society, and their  
16 government. Despite its typical literal ‘falsity,’ any effort to control it runs severe  
17 risks to free expression as dangerous as those addressed to more ‘serious’ forms

1 of communication.” Robert D. Sack, Sack on Defamation: Libel, Slander, and  
2 Related Problems § 5:5.2, at 5-130 (5th ed. 2017).

3 We have considered the Plaintiffs’ remaining arguments and conclude that  
4 they are without merit. For the foregoing reasons, the order of the District Court  
5 is AFFIRMED. On June 14, 2022, Appellants filed a “motion to supplement” that  
6 sought to address statements made during the oral argument. ECF No. 99.  
7 Because none of the points made in the motion affect our decision, the motion to  
8 supplement is denied as moot.

9 FOR THE COURT:  
10 Catherine O’Hagan Wolfe, Clerk of Court  
11

  


A True Copy

Catherine O’Hagan Wolfe, Clerk

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United States Court of Appeals, Second Circuit

  
